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In the Supreme Court of the United States

OCTOBER TERM, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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* Supreme Court Rule 37.6 Statement: No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae* or its counsel, made a monetary contribution to the preparation or submission of this brief.

INTEREST OF THE *AMICUS CURIAE*

1. The Brennan Center for Justice is a non-partisan institute formed by law clerks who served Justice William Brennan, Jr., during his thirty-four years as an Associate Justice of the United States Supreme Court, and the faculty of New York University School of Law. Before giving his approval to the enterprise, Justice Brennan obtained a promise that the Brennan Center would function as a genuinely independent center of thought on significant legal issues affecting American life. He particularly insisted that no special deference be paid to his views, or to his opinions. Justice Brennan played no role in the formulation of this brief, or in the decision to file a brief in this case.

The Center's ideal is to unite the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist both courts and legislatures in developing practical solutions to difficult problems in areas of special concern to Justice Brennan. In keeping with Justice Brennan's legendary contributions to the law of American democracy, the Center has chosen to concentrate initially on a Democracy Project.

2. The Brennan Center believes that democratic institutions function best if they are structured to be inclusive and to give citizens the widest range of political choice. In the electoral context, this means assuring that the government creates and protects a process providing fair and realistic opportunities for candidates to enter the electoral process and to disseminate their messages to potential voters. The United States Constitution, especially the First Amendment, should be construed, therefore, to impose a heavy burden on any governmental decision that restricts the opportunity of a candidate to convey his message and the opportunity of potential voters to hear it, especially when other candidates are receiving the benefit of government assistance being withheld from a competing candidate.

The Brennan Center also recognizes that practical constraints require some choices in allocating government

resources, including those devoted to the electoral process. For example, the Brennan Center supports campaign finance reform, including some degree of public financing of candidates' campaigns. This Court has held that public financing schemes may legitimately distinguish among candidates who are eligible for such government support, so long as the government applies pre-established objective criteria. *Buckley* v. *Valeo*, 424 U.S. 1, 90-108 (1976). Those criteria, though, may not reflect government favoritism toward certain candidates or parties. Any system that actually or potentially tilts in favor of candidates based on such favoritism would threaten the heart of the democratic process.

Like public financing, inclusion in a candidate debate confers a government benefit on certain candidates. Both government programs — a state-sponsored debate and a state-sponsored campaign subsidy — distribute public resources to electoral candidates. Either form of government participation in the electoral process may advance important public interests, but any such program must take care not to discriminate unduly against "disfavored" candidates or parties.

3. The judgment entered below is correct, since the petitioner, a state-owned and operated television system ("the Network"), did not comport with its constitutional obligation to formulate permissible, objective criteria before it was presented with the request by candidate Forbes to participate in the debates it sponsored. It was not sufficient simply to make a subjective, *ad hoc* judgment about whether his campaign was "newsworthy."

The Eighth Circuit's opinion sweeps too broadly, however, in appearing to foreclose government agencies from drawing any lines distinguishing among candidates who happen to satisfy the bare minimum qualifications for access to the ballot. The First Amendment does permit a government agency to fashion legitimate, viewpoint-neutral, and objective criteria to make the allocation decisions that may be necessary

as a practical matter. The Eighth Circuit's rationale thus improperly casts doubt on the validity of any feasible system of public financing of elections and, indeed, is inconsistent with *Buckley* on this point.

We submit this brief to flag the negative ramifications of any decision adopting an absolutist stance: either adopting the Network's argument that it was entitled to make its decision virtually without constitutional constraint or embracing without qualification the Eighth Circuit's rule requiring virtually unfettered access to government-sponsored or government-hosted campaign debates.

The parties have consented to the Brennan Center's participation as *amicus curiae*. Pursuant to Rule 37, letters reflecting the consent of the parties have been filed with the Clerk.

INTRODUCTION

There are at least three kinds of government involvement in a political campaign that require the government to identify or distinguish among candidates. First, the government must identify candidates and create a ballot. Second, the government must determine which candidates should have access to publicly sponsored campaign events. Third, the government must allocate public campaign subsidies, if any. While the principles of political openness and electoral fairness codified in the First, Fifth, and Fourteenth Amendments ultimately govern all three choices, the precise levels of regulatory authority and constitutional constraint necessarily differ for each set of decisions.

The government's own discretion is, and should be, at its lowest ebb in deciding who may be a candidate. This Court has recognized that, once a prospective candidate demonstrates a minimal level of electoral support, the candidate is constitutionally entitled to a place on the ballot. *Williams* v. *Rhodes*, 393 U.S. 23 (1968).

Government power is rightly at its highest level in allocating campaign subsidies among the candidates. While constitutional limits undoubtedly exist, this Court has recognized that, in an effort to assure the efficient use of scarce resources, the government may allocate campaign subsidies on the basis of previously established and objective criteria, such as past electoral success and current electoral support. *Buckley* v. *Valeo*, 424 U.S. 1, 90-108 (1976).

When, however, government-owned broadcast media choose to sponsor campaign events, such as debates between or among candidates, a more complex governmental choice must be made. In such settings, the government-owned television station acts both as a First Amendment speaker itself and as the creator of an important public forum for the speech of others. If the public broadcast station is viewed solely as a First Amendment speaker, the broadcaster would be entitled to exercise virtually unlimited discretion to determine which candidates are invited to participate in a debate. If, on the other hand, the public broadcaster is viewed solely as a conduit for the speech of the candidates, the broadcaster would become subject to "public forum" doctrine requiring government to provide equal access to all candidate/speakers, even when such equal access would materially inhibit the potential for effective debate.

The Brennan Center submits that the level of choice open to a public broadcaster in such a setting should reflect both its role as a First Amendment speaker and its public forum role as a neutral "gatekeeper" for the speech of others. See generally *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622 (1994).

At a minimum, such a government speaker/gatekeeper must operate pursuant to preexisting, objective rules setting forth criteria for participating in such a debate. Resort to amorphous standards, such as "newsworthiness," or "public interest," vests a governmental gatekeeper with excessive

discretion, and invites viewpoint-based discrimination (however subtle or hidden) against a third-party or independent candidates.

This kind of political objectivity, however, does not justify a rigid rule requiring automatic inclusion of all candidates in such a debate. That extreme position, which is essentially the approach taken by the court of appeals, fails to accord any weight to the public broadcaster's need to exercise some editorial discretion in order to assure that the debate process offers candidate and voters a meaningful and intelligible airing of views.

Where inclusion of all candidates would materially inhibit a broadcaster's ability to sponsor a meaningful debate calculated to assist voters in casting an informed ballot, it would be self-defeating to force the broadcaster to choose between no debate at all, or an exercise that, in the broadcaster's view, would not provide the electorate with helpful information. In some settings, for example, the sheer number of candidates might make a debate format unwieldy. In other settings, a candidate's level of support might be so minuscule as to render inclusion in the debate a diversion.

SUMMARY OF ARGUMENT

1. The Network, an agency owned and operated by the State of Arkansas, sponsored a candidate debate and excluded respondent Forbes from participating. It did so without relying on pre-established, legitimate, objective criteria. We agree with the judgment below that as a state actor the Network was bound by First Amendment constraints both in formulating the criteria it would use to select participants and in applying those criteria. The Eighth Circuit, therefore, correctly rejected the Network's arguments asserting virtually unrestrained discretion.

2. The Network's reliance on an essentially subjective and *ad hoc* approach to distinguishing among candidates — their relative "newsworthiness" — fails to pass constitutional muster. The First Amendment requires more careful and more verifiable standards for making that decision. Those standards must be clear, viewpoint-neutral, objective, and pre-established.

Since the Network here had failed to adopt permissible, objective criteria when it decided to sponsor debates, it was compelled to rely on *ad hoc* and subjective evaluations once candidate Forbes sought to participate. The court of appeals ruled properly that the Network's resort to subjective rationalizations did not satisfy the constitutional standard.

In this case, the Network excluded Mr. Forbes under a purely subjective, *ad hoc* standard that impermissibly favored Democrats and Republicans over all other candidates. The Network automatically afforded major party candidates access to the debates, regardless of their level of support in the community. J.A. 133-37. Thus, the Network apparently invited a Republican candidate to a debate, despite his having raised less money and demonstrated less public support than Mr. Forbes. J.A. 133-34, 175. Moreover, the Network disregarded Mr. Forbes, despite his having received 46 percent of the vote in a statewide three-candidate Republican Primary race for the Lieutenant Governor in the 1990 election cycle. J.A. 149-54. The Network's failure to operate pursuant to pre-existing objective standards, and its bias in favor of the major parties, rendered its gatekeeping decisions unconstitutional. Thus, the judgment of the Eighth Circuit should be affirmed.

3. Nevertheless, the Eighth Circuit went too far in appearing to impose an unadorned ballot-certification standard as the sole measure for inclusion in a government-sponsored candidate debate. The Eighth Circuit's blanket rule fails to

take account of legitimate public interests that a public broadcaster may seek to advance. This Court should clarify that *some* distinctions among candidates are permissible, but they must reflect previously established, legitimate and objective standards that assure that the public broadcaster is not discriminating on partisan or philosophical grounds or unduly constraining the flow of information and ideas to voters.

ARGUMENT

I. THE EIGHTH CIRCUIT CORRECTLY REJECTED THE NETWORK'S ARGUMENT THAT THE FIRST AMENDMENT ALLOWS A STATE-OPERATED TELEVISION STATION TO MAKE ESSENTIALLY STANDARDLESS, SUBJECTIVE DISTINCTIONS AMONG CANDIDATES ALLOWED TO APPEAR IN A GOVERNMENT-SPONSORED CAMPAIGN DEBATE.

1. The Network urges that a public broadcaster's decisions supported only by subjective assertions of "newsworthiness" or "editorial control" should always suffice to pass constitutional muster. See, *e.g.*, Pet. Br. at 3. The Network's oft-repeated reliance on the concepts of newsworthiness and editorial control is particularly inappropriate in this case. From the arguments of the Network and its *amici*, a reader might be led to believe that this case poses a challenge to a traditional newscast — something along the lines of the MacNeil-Lehrer NewsHour. This dispute, however, does not concern an editor's decisions concerning the top news stories of the day. This is a case in which the public broadcaster is acting consciously as a gatekeeper, allowing some people to speak directly to the public to promote their candidacy for public office, while denying other candidates that same opportunity.

The Network sponsored a debate featuring certain candidates for political office. By providing that opportunity

for the chosen candidates to speak to the television audience, the Network hoped to increase voter interest in the election, and to make the views of those candidates more widely known and understood. There is nothing nefarious about those goals — indeed, they are praiseworthy. Make no mistake, though: this was no mere news show.

This dispute challenges a government body's decision to play a significant role in the electoral process, and to favor some candidates over others in doing so. It should be judged by constitutional standards that must guide government action, not by inapplicable concepts of "newsworthiness" and editorial autonomy.

2. The Network in effect seeks an exemption from the normal constitutional standards applicable to government bodies, simply because it has undertaken to perform functions that private organizations also perform. The Network cannot so easily blink away the undeniable and constitutionally crucial fact that it is a state actor and thus is subject to constitutional constraints that do not bind editors and publishers working in the private sector.

The Network concedes that it "is an agency of the State of Arkansas" and that its operations are under the control of a board of directors all of whose members are appointed by the Governor of Arkansas with the advice and consent of the State Senate. See Pet. Br. at 6, citing Ark. Code Ann. §§ 6-3-101, 6-3-102, 25-16-804(b)(1). Thus, it is apt to recall here what the Court observed in applying the First Amendment to the resource allocations structured by the University of Virginia in *Rosenberger* v. *Rectors and Visitors of the Univ. of Va.*, 515 U.S. 819, ___, 115 S.Ct. 2510, 2513 (1995): As "an instrumentality of the" State, the Network is "thus bound by the First and Fourteenth Amendments."

Moreover, the Network also blurs important constitutional distinctions in claiming the same right to editorial autonomy enjoyed by private broadcasters — or even by "public"

stations operated by non-governmental not-for-profit corporations. The crucial distinction is between the State as speaker and the State as regulator of the opportunities of *others* to speak.

The Court carefully drew this distinction in *Rosenberger*. Pointing to such cases as *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the Court explained that, "when the State is the speaker, it may make content-based choices" and may "regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey *its own message*." 115 S. Ct. at 2518 (emphasis added). The Court then warned unambiguously, however, that it "does not follow" that a state agency has the same autonomy when the government "instead expends funds to encourage a diversity of views from private speakers." *Id.* at 2519.

The Network obscures the point by asserting, in reliance on a decision involving a privately owned broadcast system, that the "property here is a broadcast station, whose programming is not traditionally open to the public." Petitioner's Br. at 23., citing *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 116 (1973); *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981). Televised campaign debates constitute a unique form of programming when orchestrated by a state agency. Forbes was not being excluded from participating in recreational or educational programming. He was not even demanding fair treatment in response to some editorial position the Network's managers took in endorsing a rival candidate — an activity that might raise other constitutional concerns. Rather, he was seeking to share the opportunity that the Network was extending to other speakers, the competing candidates, to face the voters directly in trying to persuade them to support a particular candidate's election.

Thus, there is no need to determine more broadly whether a state-operated television station is generally a public forum

or a "limited purpose" public forum as the Court has developed those concepts. What is dispositive here in triggering searching constitutional inquiry is that this state agency elected to open up its facilities to some speakers for the undeniable purpose of allowing them, in a debate format, to address the viewing public. Under any of the approaches expressed in various opinions in cases such as *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672 (1992), and *Lee* v. *International Soc'y for Krishna Consciousness, Inc.*, 505 U.S. 830 (1992), that decision by state employees opened up a forum for candidates to address matters of public concern and to engage in public discourse. That decision made the Network's selection of eligible participants a matter of First Amendment scrutiny.

Forbes was excluded from a televised debate between congressional candidates, a program specifically designed by a state actor to influence elections. In a context where the government has a hand in influencing the democratic process itself, "both citizens and courts should be chary of efforts by government officials to control the very electoral system which is the primary check on their power." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-18, at 1097 (2d ed. 1988).

3. "Newsworthiness" and corresponding notions of editorial control are not discernable, objective standards sufficient to assure that a state-operated television station is drawing legitimate distinctions in selecting the candidates who are to be provided with this forum. *Cf. Reno* v. *ACLU*, ___ U.S. ___, No. 96-511, slip op. at 28 (June 26, 1997). Those concepts surely are not adequate substitutes for forum analysis or the other elements of First Amendment scrutiny. Considerations such as newsworthiness and the need for editorial control may play a role in the application of the constitutional standard (for example, a court might consider those concerns as it weighs the importance of government interests sought to be advanced by a public broadcaster's

policies), but those concepts do not represent a shortcut that would allow a court to bypass otherwise applicable standards of constitutional scrutiny.

The Network's preferred rule would amount to unreviewable discretion for government-owned broadcasters in selecting the speakers who may use government-owned facilities. There is no basis in this Court's jurisprudence for such a broad exception to the presumption that state actors are subject to constitutional scrutiny for their policies and actions.

The Network's argument is unprecedented — and unjustified — even in the limited terms in which it is couched. But larger democratic values are also at stake here. This is a case about elections as much as it is about broadcasters. The Court should not lose sight of the importance of candidate debates in the eyes of voters. When those debates are created and disseminated with the imprimatur of the State, they take on even more significance. These facts enhance the need for careful constitutional scrutiny.

4. The Eighth Circuit, therefore, was correct in rejecting the Network's arguments seeking to avoid any constitutional scrutiny or to apply only the most deferential review. When the government decides to create a forum for debate within an election campaign, the selection of candidates should proceed from identifiable, articulable standards. The government should not be permitted to rely on amorphous concepts that are so flexible that they can be invoked to justify any decisions, however inconsistent.[1]

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[1] For example, one of the Network's asserted reasons for excluding Forbes was that he only raised $9,000, but the Network apparently had invited a Republican nominee who had only raised $6,000 to a similar debate in the past. See J.A. 133-134, 175. When challenged with this discrepancy, the Network's only response was that "the amount of money raised was only one of the many factors [it] considered" in its decision to exclude Forbes. See Pet. Rep. Br. in

This is not to suggest, as the Network claims, that genuine editorial decisions should be open to second-guessing by the courts. It does not mean that public broadcasters can be haled into court to defend every programming decision they make. See Pet. Br. at 46. As we have explained, this is not a case of an editorial decision to run one news story (or educational program) instead of another. Rather, this is a case about direct governmental involvement in elections — favoring some candidates over others — and that governmental initiative goes to the core of our constitutional democracy. More careful constitutional scrutiny is warranted under these circumstances.

5. At its most basic level, the First Amendment prohibits government agencies from controlling a speaker's access to an otherwise available rostrum because of the content of the speaker's political philosophy. This restriction applies even when the government agency contends that it has scarce resources — including the claim of limited air time advanced here by the Network — and must draw upon some criteria to make the allocation. "The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity." *Rosenberger*, 115 S. Ct. at 2519.

This kind of concern is relevant in deciding whether the Network lived up to its constitutional obligations in limiting the debate to just the two major parties' candidates. This Court has never given the government discretionary powers to favor Republican and Democrat candidates, as such, when structuring elections. On the contrary, it has protected the diversity of political viewpoints and the rights of independent

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Support of Petition at 3. This rejoinder simply demonstrates the weakness of the Network's position. If the asserted factors cannot be used to predict the judgments of a state actor, they are no standards at all, and merely restate the government's claim to unreviewable discretion.

candidates. In *Anderson* v. *Celebrezze*, 460 U.S. 780, 794 (1983), the Court recognized that "political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream" (citing *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 186 (1979)).

In fact, the Court expressly held that burdens falling on independent candidates deserve a heightened level of scrutiny, and that their First Amendment rights should merit special protection. "[B]ecause the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny." *Anderson*, 460 U.S. at 793 n.16. The government may not impose unequal burdens on new or small political parties or independent candidates; by their very nature, such burdens impinge upon associational choices protected by the First Amendment. *Id.* at 793. The government, in short, may not simply insulate Republican and Democrat parties and candidates from external competition. *Id.* at 802.

In the Court's most recent decision addressing state regulation of elections, the Court sustained the power of a State to prevent political parties from insisting on including in the ballot their endorsement of another party's nominee. *Timmons* v. *Twin Cities Area New Party*, ___ U.S. ___, 117 S. Ct. 1364 (1997). While the Court concluded that the States have legitimate interests in avoiding excessive factionalization of the electoral system, the Court reaffirmed its string of precedents insisting that the "strong interest in the stability of their political systems * * * does not permit a State to completely insulate the two-party system from minor parties' or independent candidates' competition and influence." *Id.* at 1374. In addition, the Court explained that "[b]allots serve

primarily to elect candidates, not as fora for political expression." *Id.* at 1372.

Here, by contrast, we are talking about a state agency's decision to exclude a minor party's competing candidate from access to the "forum for political expression" created by an organ of the State of Arkansas. The burden must rest on the shoulders of the Network, therefore, to establish that both the substance of its decision and the process by which it reached that decision satisfied the prohibitions of the First Amendment.

II. STATE-OWNED TELEVISION STATIONS MUST ARTICULATE AND APPLY PRE-ESTABLISHED, VIEWPOINT-NEUTRAL, OBJECTIVE CRITERIA WHEN DISTINGUISHING AMONG CANDIDATES BEING SELECTED TO PARTICIPATE IN BROADCAST DEBATES.

1. A broadcaster sponsoring and televising a campaign debate effectively selects and promotes candidates for the attention of voters. That selection, when done by a state actor, must be based on articulable, objective standards. Distinctions that favor dominant parties over new parties or independent candidates must be carefully scrutinized to avoid an unwarranted preference for the *status quo* by those currently in power.

This case involves "core political speech" at the heart of the First Amendment. It intertwines the right of legally qualified candidates to communicate their messages effectively, without discriminatory government restrictions, and the right of the electorate to obtain access to information necessary to the effective functioning of democratic institutions.

When addressing restrictions on activities involving speech even in less compelling contexts, the Court has repeatedly insisted that the government officials must be

guided by clear, precise, and legitimate standards in deciding how to apply regulatory decisions. The First Amendment simply does not tolerate entrusting to government agents, no matter how honestly motivated they may be, the standardless discretion to decide when and how to restrain public speech.

The Court's First Amendment jurisprudence reflects a consistent line of precedents striking down on "vagueness" grounds the assertions by government officials that they enjoy discretion to decide when and how to draw lines affecting the right to speak, even in the absence of objective and legitimate legislative standards.

Thus, for example, in *Forsyth County* v. *Nationalist Movement*, 505 U.S. 123, 131-33 (1992), the Court struck down a parade permit ordinance that allowed administrative officials too much discretion to vary the permit fee. The fatal vice was that the ordinance itself "did not prescribe adequate standards for the administrator to apply when he sets a permit fee"; as a consequence, nothing in the governing law "or in its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees." See also *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990); *City of Lakewood* v. *Plain Dealer Publ'g Co.*, 486 U.S. 750 (1988); *Smith* v. *Goguen*, 415 U.S. 566 (1974); *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971); *Freedman* v. *Maryland*, 380 U.S. 51 (1965) (all invalidating restraints on some form of speech because the legislature failed to prescribe adequately clear criteria for the regulation); *cf. Reno v. ACLU*, slip op. at 24-28 (discussing problems inherent in vague speech restriction).

The Network rightly lost below, because it admittedly did not apply pre-existing and objective criteria of the sort required by the "vagueness" doctrine.

2. In selecting candidates to be invited to a state-sponsored campaign debate, a state-owned broadcasting station must be bound to use objective and pre-established criteria.

The concept is nothing new, nor should it constitute a burden as insurmountable as the Network fears. The Network need only look to the briefs filed by its own *amici* to find examples of objective criteria that are currently in use for candidate selection.

Federal regulations already hold broadcasters, newspapers, magazines and non-profit organizations that structure televised electoral debates to such objective standards, as noted by one of the Network's *amici*. See Commission on Presidential Debates Am. Br. at 2, citing 11 C.F.R. §110.13. (We reprint this regulation in full in Appendix A, *infra*.) The applicable federal regulation requires that organizations that stage presidential debates must select participants based on "pre-established objective criteria," and it pointedly prohibits selection solely based on party affiliation:

> "For general election debates, staging organization(s) shall not use nomination by any particular political party as the sole objective criterion to determine whether to include a candidate in a debate." 11 C.F.R. §110.13(c).

Staging organizations may not pick and choose among candidates on an *ad hoc* basis, as the Network apparently did here, nor may they simply invoke journalistic judgments of indeterminate scope to justify a particular decision after the fact.

For example, petitioner's *amicus* Commision on Presidential Debates, a not-for-profit organization that sponsors the quadrennial presidential debates, informs the Court that it

> "has long recognized the need to develop, and has developed, nonpartisan criteria to ensure that it identifies all of the candidates in a particular election year who, regardless of party affiliation and in light of the educational goals of the CPD's debates, properly should

> be invited to participate in those debates." Commission on Presidential Debates Am. Br. at 2-3.

Although the Commission states that it has "eschewed a mechanical approach to making this decision," it reports that it has had no difficulty articulating "objective" criteria to guide its selections. Indeed, the Commission's guidelines refer to a variety of what they characterize as "objective considerations," including "evidence of national organization," "organization in a majority of congressional districts," "[e]ligibility for matching funds" from the FEC, "[c]olumn inches on newspaper front pages," "findings of significant public opinion polls conducted by national polling and news organizations," and "[r]eported attendance at meetings and rallies."[2]

Appearing as another *amicus curiae* to support the Network, the City of New York calls attention to the provisions of its local law under which candidates for major City offices must participate in public debates, if they are to claim public financing. A government agency selects the sponsors of the debates, who must be independent of any of

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[2] The fact that the criteria are objective, of course, does not necessarily mean that they are constitutionally legitimate or assure that they are appropriately applied. For example, despite its "objective" criteria, the Commission on Presidential Debates excluded H. Ross Perot from the 1996 presidential debates, even though he already had qualified for government funding to support his presidential bid. If the decision to exclude Perot from the debates had been made by a publicly owned broadcast station, it would have violated the First and Fifth Amendments.

As discussed *supra*, pp. 3-5, the government has a narrower degree of constitutional leeway in regulating access to government-sponsored campaign debates than it does in allocating public resources, such as taxpayer financing, among qualified candidates. Thus, any candidate who qualifies for public funding *a fortiori* must be included in any publicly sponsored candidate debate.

the candidates or political parties. Most important, however, the City insists that the "[p]otential sponsors must set forth objective, non-partisan, and non-discriminatory criteria that they intend to use to identify leading contenders" to be invited to participate. City of New York Am. Br. at 3.

If private actors can and do develop objective, pre-decision standards to constrain their selection of candidates to invite to their debates, it is only reasonable to insist that state actors should abide by the same principles. After all, their influence on elections is subject to constitutional scrutiny, and it is especially vital to assure that state officials' intervention in the electoral process is even-handed. This constitutional requirement would prevent the perception, as well as the real possibility, of discrimination against independent candidates and parties.

Contrary to the Network's concerns, having an articulable standard based on pre-established, objective criteria does not unreasonably burden its "editorial" decision-making. State broadcast agencies elsewhere already adhere to similar standards for distinguishing among candidates. For example, another *amicus* appearing to support the Network, New Jersey's state-owned television station, currently admits participants to televised debates based on their eligibility for public funding. "As such, neither a candidate's political party affiliation, political philosophy [n]or electoral viability are relevant considerations. This scheme is constitutionally valid," the State emphasizes, "because it is based upon an objective criterion." State of New Jersey Am. Br. at 1-2.

3. The specific, pre-established criteria that several of the *amici* have developed are a far cry from the kind of standardless, subjective, *ad hoc* test that the Network used in deciding to exclude Forbes from its debate. As the Network describes the inquiry, its managers turned Forbes aside because of the "feeling among both the professional staff at AETN" and the local Associated Press bureau chief that time

had to be allocated to just two candidates, and the Network's executive director then concluded that, in her "professional editorial judgment," Forbes "was not newsworthy enough to be invited to the debate." See Pet. Br. at 14, 17, 3.

At trial, the Network officials testified to a series of factors that they considered in reaching that conclusion. See Pet. Br. at 15-16. Some of those factors may be legitimate; others may be too subjective. There is no doubt, though, that the decision was an *ad hoc* one that favored the major party candidates over a well-known third party candidate.

As we have shown, the Network's own *amici* have endeavored to develop objective standards for implementing this important undertaking and to avoid the dangers of relying solely on *ad hoc*, subjective considerations. The Network, by contrast, never bothered to prescribe and then to apply legitimate, objective criteria that would guide its exercise of discretion in an area of core First Amendment concern. Despite ample notice in *Buckley* and elsewhere of the need to identify permissible objective criteria for measuring a candidate's political viability and corresponding entitlement to electoral benefits, the Network insisted on applying a subjective, *ad hoc* approach. That approach conflicted with the Network's obligations under the First Amendment and, as the court of appeals held, entitles Forbes to at least nominal damages.

III. THE EIGHTH CIRCUIT'S UNNECESSARILY BROAD HOLDING SHOULD BE RECONCILED WITH THIS COURT'S DECISION IN THE CONTEXT OF PUBLIC FUNDING OF CAMPAIGNS THAT THE GOVERNMENT MAY DISTINGUISH AMONG CANDIDATES IF IT APPLIES PRE-EXISTING, NEUTRAL, LEGITIMATE, AND OBJECTIVE CRITERIA.

1. While the Eighth Circuit was right in ruling against the Network, the standard it imposed for including candidates is inappropriately — and unnecessarily — broad. By requiring state-owned television stations to grant air time to all ballot-certified candidates whenever a station sponsors a campaign debate, the Eighth Circuit's holding improperly conflates the three sets of government decisions concerning participation in a political campaign. The government may, and should, apply different criteria to its decisions regulating access to the ballot, access to publicly funded debates, and access to public financing.

Thus, the Eighth Circuit's broad holding, if extended to challenges to public funding of campaign finance, could be construed to require that benefits such as public funds be made available to all candidates authorized to appear on the ballot, irrespective of their demonstrated level of public support or realistic viability as candidates with a reasonable prospect of achieving victory. A blanket rule such as the Eighth Circuit's implies that no government agency has a right to deny public funding, or other public benefits, to candidates once they have been legally certified to appear on the ballot. Such a rule could inhibit the development of public funding schemes that appropriately distinguish among candidates based on objective criteria of viability, such as those upheld in *Buckley*.

In *Buckley* the Court decided that ballot-access thresholds should not necessarily be equated with eligibility to receive

other election-related benefits. The Court explicitly recognized a "significant distinction" between the two scenarios. *Buckley*, 424 U.S. at 101. Under the federal campaign financing program, candidates of new parties seeking federal funding must show that they secured at least 5% of the popular vote in the prior election. Challengers of the funding scheme argued that the 5% threshold requirement for general election funding was too stringent when compared with that for ballot access, which some States set below 5%. See *id.* at 103. The Court rejected the comparison, differentiating the standard for obtaining ballot access from the right to public funding.

Ballot access, the Court explained, is "a step in any campaign that, with rare exceptions, is essential to successful effort * * * funding is, however, not as necessary as being on the ballot." *Id.*, at 101. Ballot access regulations are necessarily liberal for the sake of encouraging independent candidates to run. Nevertheless, they were not designed for purposes of allocating other electoral benefits, and they do not offer the constitutionally required standard for granting access to televised debates.

By requiring state-owned television stations to grant air time access to any candidate who meets a fairly liberal threshold of ballot certification, the court of appeals failed to recognize that different public interests are at stake when the government structures other election-related programs, including public financing and broadcast debates. The Eighth Circuit should have limited its rationale to rely solely on the Network's failure to have formulated pre-established, legitimate, and objective criteria that would have channeled the officials' exercise of discretion and minimized the risk of content-based or politically motivated discrimination against independent candidates.

2. The case before the Court should lead the Court to reject a rigid rule requiring participation by all candidates.

There is, however, no basis for trying to craft a comprehensive code articulating the objective factors that may or should constrain the government broadcaster's access decision. Rather, public broadcasters are entitled, in the first instance, to have the opportunity to draft objective criteria governing access to publicly sponsored debates.

As broad touchstones for this exercise, it is sufficient to observe that such criteria may not properly turn solely on party affiliation or even on the "likelihood" of ultimate electoral success. Rather, a publicly sponsored debate should include all candidates who have demonstrated sufficient support in the community that their participation in the debate will serve to enhance the voters' understanding of the issues. As history reminds us, a candidate does not need to win an election to be an important participant in the political debates that are the essence of our democratic form of government.

CONCLUSION

The judgment of the Eighth Circuit should be affirmed, but the broad rationale announced by that court should be narrowed and clarified.

Respectfully submitted.

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Appendix A

Federal Election Commission Regulation

11 C.F.R. § 110.13. Candidate debates.

(a) *Staging organizations.* (1) Nonprofit organizations described in 26 U.S.C. 501 (c)(3) or (c)(4) and which do not endorse, support, or oppose political candidates or political parties may stage candidate debates in accordance with this section and 11 C.F.R. 114.4(f).

(2) Broadcasters, *bona fide* newspapers, magazines and other periodical publications may stage candidate debates in accordance with this section and 11 C.F.R. 114.4(f).

(b) *Debate structure.* The structure of debates staged in accordance with this section and 11 C.F.R. 114.4(f) is left to the discretion of the staging organization(s), provided that:

(1) Such debates include at least two candidates; and

(2) The staging organization(s) does not structure the debates to promote or advance one candidate over another.

(c) *Criteria for candidate selection.* For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organization(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate. For debates held prior to a primary election, caucus or convention, staging organizations may restrict candidate participation to candidates seeking the nomination of one party, and need not stage a debate for candidates seeking the nomination of any other political party or independent candidates.